No. 85-1896

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

WALTER WENCKE, et al.,
Defendants.

THEODORE deLUSIGNAN,
Petitioner,

v.

R. N. GOULD, Receiver-Trustee,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF THE CASE

The material facts and circumstances giving rise to the petition are fully set forth in the Opinion of the Ninth Circuit Court of Appeals which is included as Appendix A to the petition and which is herein incorporated by reference.

INTRODUCTION

The petition for writ of certiorari does not present to this Court any unique issues of statutory construction or constitutional import. This case was properly affirmed by the Ninth Circuit in a manner consistent with prior Supreme Court decisions and is predicated on a securities law disgorgement proceeding that does not present an appropriate vehicle for this Court's intercession. Combining these facts with the Ninth Circuit's findings that the petitioner failed to proceed diligently in the district court leads to the conclusion that this case is not suitable for this Court's review.

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE NINTH CIRCUIT'S EXERCISE OF JURISDICTION WAS CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

The district court's disgorgement order was directed exclusively at the assets of The Ramapo Corporation ("Ramapo"). It was not a judgment against the petitioner, Theodore deLusignan ("deLusignan"), nor did it seek any relief from him. Employing conventional judicial standards, both the district court and Ninth Circuit concluded that they possessed the requisite jurisdiction over Ramapo as well as the disgorged assets. In fact, the Ninth Circuit specifically found that the district court had personal

jurisdiction over both Ramapo and deLusignan. [Petition, p. A-7, fn. 5.][1]

The present petition does not originate from the entity (Ramapo) whose assets were disgorged nor is it derived from a shareholder's suit brought to protect a corporate right. Instead, it is brought by an individual (deLusignan), who seeks to unravel a legal proceeding involving assets of a corporation of which he is a minority shareholder. Ramapo did not appeal the disgorgement order nor is it a party to the petition.

deLusignan argues that the disgorgement order was improperly entered against him as a nonparty in a manner exceeding the district court's jurisdiction. This position is untenable for several reasons. First and foremost, the disgorgement order was directed exclusively at the assets of Ramapo, not deLusignan. Ramapo and its assets have been subject to the exclusive jurisdiction of the district court since 1977. [Petition, p. B-12, Conclusion of Law 2.] Second, the Ninth Circuit affirmed that Ramapo and deLusignan had been afforded notice and an opportunity to be heard and that there was no deprivation of their due process rights. [Petition, p. A-17.] Third, the Ninth Circuit held that as a result of the procedural safeguards employed during the disgorgement proceedings Ramapo and deLusignan had, essentially, been treated as intervening parties [Petition, p. A-10], and that the district court had personal jurisdiction over both [Petition, p. A-7, fn.5]. Finally, the credibility of deLusignan's argument is diminished by his failure to avail himself of the opportunities presented to him at the district court level.[2] As stated by the Ninth Circuit, "Nothing prevented

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[1] The February 19, 1986 Opinion of the United States Court of Appeals is reported at 783 F.2d 829 and is reprinted in the Petition's Appendix at pages A-1 through A-18. References to the Ninth Circuit Opinion will be made to the page number of said Appendix.

[2] The disgorgement process initiated with the entry of a Final Judgment on March 7, 1977, in *SEC v. Wencke*, Civil No. 76-0783-GT, United States District Court for the Southern District of California. It was followed by an Order

(Footnote continued on page 4)

deLusignan . . . from filing a responsive pleading to the disgorgement application or seeking discovery at any time between 1981 and the issuance of the district court's disgorgement order in November 1983." [Petition, p. A-15.] The Ninth Circuit also referred to deLusignan's failure to introduce evidence or question witnesses at the disgorgement hearing, his failure to make objections on the merits or request a continuance. [Petition, pp. A-15-17.] deLusignan's failure to participate at the district court level weighs against the suitability of this Court's review of this action.

Consistent with his lack of diligence at the district court level, deLusignan failed to note in the petition's Statement of Facts that on April 7, 1986, the mandate of the Ninth Circuit opinion was issued by the district court. At that time, deLusignan neither petitioned the Ninth Circuit for rehearing nor did he move, pursuant to Federal Rule of Appellate Procedure 41(b), for a stay of the mandate pending application to this Court for a writ of certiorari.

In support of his jurisdiction argument, deLusignan relies primarily on the Supreme Court cases of *Hansberry v. Lee*, 311 U.S. 32 (1940) and *Zenith Radio Corp. v. Hazeltine*, 395 U.S. 100 (1969), which were also considered by the Ninth Circuit. He fails to demonstrate to this Court any actual conflict between these cases and the Ninth Circuit Opinion. Rather than presenting an objective analysis of any purported conflict, deLusignan merely

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(Footnote continued from page 3)

Authorizing Disgorgement on March 27, 1979. Disgorgement Application No. 4 was then filed and served on deLusignan on April 22, 1981. Discovery was undertaken, including deLusignan's deposition on April 22, June 29-30, 1981. A noticed evidentiary disgorgement hearing was held before a United States Magistrate and Special Master on September 7, 1983, who then lodged his Findings of Fact, Conclusions of Law and Recommendations re Application No. 4 with the district court. [B-3 through B-16 of the Petition's Appendix.] A noticed hearing was then held before the district court on October 24, 1983, which entered its separate Order Adopting Findings of Fact, Conclusions of Law and Recommendations re Receiver's Application No. 4 in Disgorgement on November 7, 1983. [B-1 through B-2 of Petition.]

revives the arguments presented to the lower courts. deLusignan cites the *Hansberry* case for its holding that a party

> "is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."

Hansberry v. Lee, supra, 311 U.S. at 40.

However, in the instant action, there exists no judgment *in personam* against deLusignan. The *Hansberry* holding is not applicable to deLusignan's situation. Additionally, he was *named* and *served* as a party to disgorgement. The principles of the *Hansberry* case do not conflict with the disgorgement proceedings.

The *Zenith* case is distinguishable in that it discusses the propriety of a judgment *in personam* directly against a corporation, Hazeltine Corporation, which was not a party to the action. deLusignan's attempt to align himself with the Hazeltine Corporation position is illogical since the disgorgement order is not a judgment *in personam* against him, but is directed at the assets of a corporation of which he is only a minority shareholder. For these reasons, the cited cases do not present this Court with a conflict and are consistent with the district court order and Ninth Circuit Opinion.

II

THE DISGORGEMENT PROCEDURES CONFORMED WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND AFFORDED DELUSIGNAN DUE PROCESS

deLusignan's second argument is premised on his belief that the summary nature of the disgorgement proceedings did not comply with the Federal Rules of Civil Procedure. His argument is one of

form, not of substance, and it ignores the procedural safeguards which both the district court and the Ninth Circuit found to be sufficient to protect his due process rights.

The disgorgement proceeding employed by the district court was part of the receivership action, *Securities and Exchange Commission v. Walter Wencke, et al.*, Civil No. 76-0783-GT, United States District Court for the Southern District of California ("*SEC v. Wencke*"). The *SEC v. Wencke* case began with the filing of a complaint by the SEC in 1976 and has been litigated in a manner consistent with the Federal Rules of Civil Procedure. The disgorgement proceeding was not a new action and its subject matter was limited to the ill-gotten gains within the exclusive jurisdiction of the receivership court. Prior to this disgorgement application, the district court had held notice hearings wherein the disgorgement process was discussed and formulated in open court. Subsequently, an order was entered by the Court setting forth the purpose, goals and procedures of disgorgement and made a matter of public record.[3]

As the Ninth Circuit noted, although deLusignan was served with the disgorgement application more than two years prior to the disgorgement hearings, he failed to file a responsive pleading or seek discovery. [Petition, p. A-16.] At the disgorgement hearing, deLusignan was given the opportunity to introduce evidence and to call and cross-examine witnesses. Yet his counsel merely entered a "special appearance" and waived his opportunity to litigate the case on its merits. Finally, deLusignan failed to make any objections to the Findings of Fact and Conclusions of Law filed by the United States Magistrate and Special Master and did not request a continuance to do so. deLusignan was given the opportunity to take discovery and to file whatever responsive pleadings or briefs that he saw fit to do. The disgorgement court applied the Federal Rules of Evidence. A noticed Application was served upon deLusignan naming him, Ramapo and others as parties to

[3] Order Authorizing Disgorgement, March 27, 1979, *SEC v. Wencke, supra*. The Ninth Circuit referred to this Order at page A-4 of the petition.

disgorgement. deLusignan cannot now seriously claim that he lacked notice of the nature of the proceedings as well as an opportunity to be heard. In essence, deLusignan has attempted to argue that the disgorgement proceedings differed from the plenary process. What he fails to do is set forth any basis demonstrating that this purported difference substantially affected his rights or prejudiced him in any way. deLusignan received substantially all of the procedural protections that he would have been afforded if the disgorgement proceeding had been an independent, plenary action. Furthermore, the district court had the power to enter its *in personam* judgment against Ramapo, regardless of deLusignan's status in the disgorgement proceeding.

deLusignan cites *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404 (1960), in support of his contention that the disgorgement process was improper. He ignores the Ninth Circuit's well-reasoned analysis which specifically refers to the exceptions set forth in the *Scanlon* case [Petition, p. A-14, fn. 9) wherein summary proceedings were deemed acceptable:

> It is true that courts have sometimes passed on ownership of property in their custody without a plenary proceeding where, for illustration, such a proceeding was ancillary to a pending action or where property was held in the custody of court officers, subject to court orders and court discipline.

New Hampshire Fire Ins. Co. v. Scanlon, supra, 362 U.S. at 409-10. The disgorgement proceeding was not only ancillary to the pending *SEC v. Wencke* action, but also involved assets held by the federal court-appointed receiver. The Ninth Circuit recognized the applicability of these exceptions and cited cases from four other circuits where summary proceedings were employed. [Petition, p. A-14, fn. 9.] Moreover, deLusignan incorrectly asserts at page 16 of his petition that the Ninth Circuit determined that, "there was no *in rem* jurisdiction over petitioner's Ramapo shares or Ramapo's PSI shares." Review of the Opinion reveals that the

Ninth Circuit did not find it necessary to resolve that issue since it concluded that, "We need not decide the precise extent of the district court's *in rem* jurisdiction, however, in light of our conclusion that the district court had personal jurisdiction over both Ramapo and deLusignan." [Petition, p. A-7, fn. 5.]

deLusignan implies that the Ninth Circuit approval of the use of summary proceedings in the disgorgement proceeding will have widespread consequences necessitating this Court's exercise of its supervisory power. To the contrary, the Ninth Circuit Opinion is limited to post-judgment proceedings in the unique circumstances of a securities receivership wherein it is ancillary to an existing action, where adequate procedural safeguards are employed and the court has jurisdiction over the necessary parties.

The Ninth Circuit's reliance on *SEC v. Universal Financial*, 760 F.2d 1034 (9th Cir. 1985) is well-founded. The *Universal Financial* case is similar in that it also involved a large-scale securities receivership with a complex myriad of transactions, investors and creditors. The summary proceedings utilized in *Universal Financial* employed procedural safeguards very similar to the case at bar.

deLusignan claims that the present case is distinguishable from *Universal Financial* for, among other reasons, the fact he had no time for discovery, briefing and trial preparation and that there was no mechanism by which to answer or bring a motion. The Ninth Circuit found differently. As the Ninth Circuit stated, from the beginning of this disgorgement application until the entry of the disgorgement order in November 1983, "DeLusignan did nothing during that time on behalf of himself or Ramapo." [Petition, p. A-16.] If there was one common thread that permeates both cases, it was that the procedural safeguards afforded the interested parties were more than sufficient to ensure their respective right to due process of law.

The Federal Rules of Civil Procedure are guidelines designed to "be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1 of the Federal Rules of Civil Procedure. As Mr. Justice Black has stated, "The principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts." Order Adopting Revised Rules of the Supreme Court, 346 U.S. 946 (1954). This is also true of the Fifth Amendment right to due process. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, this policy of flexibility eliminates the need for this Court to exercise its supervisory power over the Ninth Circuit's approval of the summary disgorgement proceedings.

CONCLUSION

The petition seeks to burden this Court with the review of a decision the effect of which is procedural and limited. Moreover, deLusignan's petition is actually a request for this Court to break new legal ground. Carried to its logical conclusion, deLusignan's argument would have this Court require a corporation's shareholders to be named and served as parties to any action which seeks *in personam* relief solely against that corporation.

The decision of the Ninth Circuit will facilitate the enforcement of the federal securities laws and is in the best interests of the general public. The decision below is correct and well-reasoned. It is consistent with this Court's prior interpretations of the Fifth Amendment right to due process and is not in conflict with prior decisions of this Court or other circuits.

The Receiver respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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